United States Court of Appeals

for the Second Circuit

APPENDIX

B

P/S

75-7335

IN THE

United States Court of Appeals

For the Second Circuit

Docket No. 75-7335

FRANCIS J. MARKHAM and GEORGE W. MARKHAM,

Plaintiffs-Appellants,

against

WILLIAM H. ANDERSON, JR.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

APPELLANTS' APPENDIX

BRANDT AND LAUGHLIN, P.C.
Attorneys for Plaintiffs-Appellants
158 East Main Street
Westfield, New York 14787
(716) 326-3174

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PAGINATION AS IN ORIGINAL COPY

INDEX FOR RECORD ON APPEAL

DOCKET ENTRIES

DOCKET ENTREES

CIVIL DOCKET
UNITED STATES DISTRICT COURT

JOHN T. CURTIN

Jury demand date:

D. C. Form No. 104 Rev.

Civ-1973-547

TITLE OF CASE	ATTORNEYS
FRANCES J. MARKHAM and GEORGE W. MARKHAM v. ROBERT E. GRAY, THE KAPLAN TRUCKING COMPANY and WILLIAM H. ANDERSON, JR. - dismissed 5/1/75	For plaintiff: Robert M. Laughlin, Esq. Brandt and Laughlin, P.C. 158 East Main Street P.O. Box 155 Westfield, N.Y. 14787 716-326-3174
	For defendant: Philip J. O'Shea, Esq. Kaplan T O'Shea, Adamson, Reynolds & N 620 Liberty Bank Building Buffalo, New York 14202 Donald B. Eppers, Esq. Robert G Brown, Kelly, Turner, Hassett Leach 700 Niagara Frontier Building 290 Main Street Buffalo, New York 14202
John M. McLaughlin, Esq. Wm Anderson Knox, Graham, Pearson, McLaughlin and Sennett, Inc. 23 West 10th Street, P.O. Box 216 Erie, Pennsylvania 16512	

STATISTICAL RECORD	COSTS			DATE	NAME OR RECEIPT NO.	REC.		DATE
J.S. 5 mailed	Clerk			9/18/73	#11264	15	00	
				11/14/73	Fees of US Atty			
J.S. 6 mailed	Marshal							
Basis of Action: Diversity- Negligence $420,000.00	Docket fee							
	Witness fees							
Action arose at:	Depositions							

DOCKET ENTREES

Civ-1973-547 Frances J. Markham & George W. Markham v. Robert E. Gray et al

DATE	PROCEEDINGS	Date O Judgmen
1973		
Nov. 8	Filed complaint.	
8	Issued summons and three copies.	
8	JS 5 made	
Dec. 24	Filed Deft. Wm. Anderson, Jr. motion to quash return of service of summons & to dismiss complaint as to Wm. H. Anderson, Jr. ret.4-22-74	
1974		
Jan. 10	Filed Mar. ret. on S&C served on Kaplan Trucking on 11-19-73; Robert E. Gray on 12-27-73 and Wm. H. Anderson, Jr. on 12-4-73.	
15	" Deft. Kaplan Trucking answer to complaint.	
Feb. 27	Filed Deft., Robert E. Gray , answer to complaint.	
Mar. 12	Filed Deft. Kaplan Trucking Co. interrogatories to pltfs.	
Apr. 19	" Petrs. affidavit in opposition to motion to quash ret. of service of summons etc.	
22	Motion to dismiss complaint, etc. Memos to be filed not later than 5-20-74, then considered submitted	
22	Filed Deft. Anderson's Memorandum of Law re lack of personal jurisdiction	
29	Filed Pltfs. answer to interrogatories. of deft. Kaplan Trucking	
May 20	Return date for briefs. Submitted.	
21	Filed Pltfs. brief in opposition to deft. Anderson's motion to dismiss	
June 26	Filed Pltfs. amended answers to interrogatories.	
July30	Filed order allowing pltf. to take depositions, file interrogatories, or conduct other discovery; the parties are to file additional briefs by 9-30-74-Curtin, DJ Notice & copies to Messrs. Laughlin, McLaughlin, O'Shea & Eppers Submitted.	F-1
Sept. 16	Filed Deft., Wm. H. Anderson, answers to pltfs. interrogatories.	
27	" Deft., William H. Anderson, Jr., memorandum of law re lack of personal jurisdiction	
30	Filed Pltfs. supplemental brief in opposition to defts., Anderson's, motion to dismiss	
30	Filed pltfs. request that deft., Wm.H. Anderson, Jr. answer interrogatori	
1975		
May 1	Filed order & decision granting defts. motion to dismiss the cause of action against Dr. Anderson because of the fact that this Ct. cannot maintain jurisdiction-Curtin, DJ Notice & copies to Robert Laughlin, Philip O'Shea, Donald Eppers & John McLaughlin.	F-1
1	Filed judgement dismissing the action against deft. William H. Anderson, Jr.-Clerk Notice & copies to Messrs. Laughlin, O'Shea, Eppers & McLaughlin	F-
27	" Pltfs'. Notice of Appeal from judgment entered 5/1/75 (copy mailed to Messrs. Eppers, O'Shea and McLaughlin and to Clerk CCA with copy of docket entries; CCA's Forms C and D mailed to Mr. Laughlin)	
June 27	" Stipulation as to papers to be included in record on appeal	

Complaint

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

FRANCES J. [illegible] and GEORGE H. [illegible],

Plaintiffs,

-against-

ROBERT E. GRAY, THE KAPLAN TRUCKING COMPANY and WILLIAM H. ANDERSON, JR.,

Defendants.

COMPLAINT
Civil Action No.

Plaintiffs, by their attorney, Brandt and Laughlin, P. C., allege:

AS AND FOR A FIRST CAUSE OF ACTION ON BEHALF OF PLAINTIFF FRANCES J. [illegible]

1. Plaintiffs are citizens of the State of New York; defendant Robert E. Gray is a citizen of the Commonwealth of Pennsylvania, The Kaplan Trucking Company is a citizen of the State of Ohio and defendant William H. Anderson, Jr. is a citizen of the Commonwealth of Pennsylvania. The amount in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

2. On February 18, 1972 on a public highway called the New York State Thruway (Route 90) at the Ripley, New York toll barrier, defendant Robert E. Gray, then employed by defendant The Kaplan Trucking Company, wilfully or recklessly or negligently drove a motor vehicle then owned by and/or leased to the Kaplan Trucking Company, against plaintiff, Frances J. Markham who was then rightfully in a toll booth on said highway.

3. As a result, plaintiff Frances J. [illegible] was thrown down and seriously injured, was prevented from attending to her business and was caused to suffer great pain of body and mind.

4. Upon information and belief, prior to February 18, 1972, and from 1950 to 1971, defendant William H. Anderson, M.D., a medical doctor, examined defendant Robert E. Gray and wilfully or recklessly or negligently certified that defendant Robert E. Gray was qualified to operate motor vehicles in

accordance with Federal Motor Carrier Safety Regulations.

5. Plaintiffs were in no way negligent and in no way contributed to Frances J. Markham's injuries.

AS AND FOR A SECOND CAUSE OF ACTION ON BEHALF OF PLAINTIFF GEORGE M. MARKHAM

6. Plaintiff George M. Markham repeats and realleges all of the allegations contained in paragraphs 1 through 5 above.

7. Plaintiff George M. Markham is the husband of plaintiff Frances J. Markham.

8. As a result of the aforesaid injuries suffered by plaintiff Frances J. Markham due solely to the negligence of defendant, plaintiff Frances J. Markham has been unable to perform services which she had formerly performed for plaintiff George M. Markham and she will continue to be so disabled for a long time; plaintiff George M. Markham has been and will continue to be deprived of plaintiff Frances J. Markham's society, companionship and services.

9. As a result of the aforesaid injuries suffered by plaintiff Frances J. Markham, plaintiff George M. Markham has been compelled to incur and will incur expenses for medical attention and hospitalization of Frances J. Markham in excess of $1200.00.

WHEREFORE, plaintiffs demand judgment against defendants in the following amounts:

1. On the first cause of action, $100,000.00 compensatory damages;

2. On the first cause of action,$000,000.00 punitive damages;

3. On the second cause of action, $20,000.00 compensatory damages, together with costs and disbursements.

Dated, October 30, 1973.

BRANDT AND LAUGHLIN, P. C.

By _____
Robert A. Laughlin

Post Office Box 155
153 East Main Street
Westfield, New York 14787
(716) 326-3174

Motion of defendant Anderson to quash return of service of summons and to dismiss complaint as to William H. Anderson, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

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FRANCES J. MARKHAM and GEORGE W. MARKHAM	:	
vs.	:	CIVIL ACTION #1973 - 547
ROBERT E. GRAY, THE KAPLAN TRUCKING COMPANY, and WILLIAM H. ANDERSON, Jr.	:	

MOTION TO QUASH RETURN OF SERVICE OF SUMMONS AND TO DISMISS COMPLAINT AS TO WILLIAM H. ANDERSON, JR.

The defendant, William H. Anderson, Jr. by his attorneys, English, Bowler and Jenks, moves this Court to Quash the return of service of Summons and to dismiss the Complaint as to him for reasons of insufficiency of service of process and for lack of jurisdiction over the person of the defendant.

1. The records of the United States Marshall for the Western District of New York, at Buffalo, New York, disclose that service upon the defendant, William H. Anderson, Jr., was made by Richard Johnson, United States Marshall for the Western District of Pennsylvania, on December 4, 1973, at 1:30 P.M. at Route 20, West Springfield, Pennsylvania.

2. As averred in Paragraph #1 of the Complaint, William H. Anderson, Jr. is a citizen of the Commonwealth of Pennsylvania, and he has not been properly served with process pursuant to Rule 4 of the Federal Rules of Civil Procedure as service was made beyond the territorial limits of the state in which the District Court is held.

WHEREFORE, the defendant, William H. Anderson, Jr. requests that the return of service of Summons be quashed and the Complaint be dismissed as to him.

Respectfully submitted,

ENGLISH, BOWLER AND JENKS

By James R. Jenks
James R. Jenks
Attorney for [illegible]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

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FRANCES J. MARKHAM and GEORGE W. MARKHAM	:	
vs.	:	CIVIL ACTION #1973 - 547
ROBERT E. GRAY, THE KAPLAN TRUCKING COMPANY, and WILLIAM H. ANDERSON, Jr.	:	

NOTICE OF MOTION TO QUASH RETURN OF SERVICE OF SUMMONS AND TO DISMISS COMPLAINT AS TO WILLIAM H. ANDERSON, JR.

TO: Brandt and Laughlin, P.D.
Post Office Box 155
158 East Main Street
Westfield, New York

Kaplan Trucking Company
2900 Chester Avenue
Cleveland, Ohio

Robert E. Gray
East Springfield
Pennsylvania

Clerk of Courts
United States District for the
Western District of New York
68 Court Street
United States Court Building
Buffalo, New York 14202

Please take notice that the within Motion to Quash Return of Service of Summons and to Dismiss Complaint as to William H. Anderson, Jr. is being filed today with argument to be heard thereon at a time convenient to the Court.

English, Bowler and Jenks

Dated December 21, 1973

By James R. Jenks
James R. Jenks
Attorney for William H. Anderson, Jr.

The undersigned does hereby certify that on the 21 day of December, 1973, a copy of the within Motion was duly served on all counsel of record by mailing the same to them at their designated offices by First Class United States Mail, postage prepaid, and upon the defendants.

English, Bowler & Jenks

By
James R. Jenks

Plaintiffs' affidavit in opposition to motion to quash return of summons and to dismiss complaint

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

40a

FRANCES J. MARKHAM and GEORGE W. MARKHAM,

Plaintiffs,

-against-

ROBERT GRAY, THE KAPLAN TRUCKING COMPANY and WILLIAM H. ANDERSON, JR.,

Defendants.

CIVIL ACTION 1973-547

AFFIDAVIT

STATE OF NEW YORK)
) ss:
County of Chautauqua)

ROBERT M. LAUGHLIN, being duly sworn, deposes and says:

1. Deponent is an attorney at law and an officer of Brandt and Laughlin, P. C., attorney for plaintiffs, and as such is fully familiar with all the facts and circumstances contained herein.

2. This affidavit is in opposition to a motion to quash return of the service of a summons on William H. Anderson, Jr. and to dismiss the complaint as to William H. Anderson, Jr. Said motion alleges that William H. Anderson, Jr. has not been properly served with process pursuant to Rule 4 of the Federal Rules of Civil Procedure as service was made beyond the territorial limits of the state in which the District Court is held.

3. This action arises out of an accident in which plaintiff Frances J. Markham, while in a tollbooth on the New York State Thruway at Ripley, New York, was struck by a vehicle then operated by defendant Robert E. Gray. Said vehicle was engaged in interstate commerce. As alleged in the complaint, William H. Anderson, Jr. is a medical doctor who certified

Robert E. Gray as being fit to drive in interstate commerce in violation of federal laws and regulations.

4. Upon information and belief, service of process on William H. Anderson, Jr. was proper in that such service is authorized by §302 (a)(3)(ii) of the New York Civil Practice Law and Rules, a copy of which is attached hereto and made a part hereof.

It is alleged that defendant William H. Anderson, Jr. committed a tortious act in the Commonwealth of Pennsylvania which caused injury to the plaintiffs within the State of New York. Due to the nature of the tortious act, that being a wrongful certification to allow defendant Gray to engage in interstate commerce, it is alleged that defendant Anderson should reasonably have expected consequences in New York State. Furthermore, upon information and belief, defendant Anderson derives substantial revenue from interstate commerce in that he is a resident of Pennsylvania and practices medicine in an Ohio hospital. The source of deponent's information is a phone conversation with Brown Memorial Hospital of Conneaut, Ohio.

5. Deponent believes that in order to determine the validity of service upon William H. Anderson, Jr. it will be necessary to utilize available discovery procedures so that factual determinations may be made as to the requirements under §302 of the New York Civil Practice Law and Rules.

WHEREFORE, deponent requests that defendant William H. Anderson, Jr.'s motion to quash return of service of the summons and to dismiss the complaint be dismissed or, in the alternative, that the Court permit discovery in order to properly determine the motion.

Sworn to before me
April 16, 1974.

/s/ Robert H. Laughlin
Robert H. Laughlin

/s/ [illegible]
Notary Public

Defendant Anderson's memorandum of law re: lack of personal jurisdiction over defendant Anderson

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

FRANCES J. MARKHAM and GEORGE MARKHAM	:	
vs.	:	CIVIL ACTION NO. 1973 - 547
ROBERT E. GRAY, THE KAPLAN TRUCKING COMPANY, and WILLIAM H. ANDERSON, JR.	:	

MEMORANDUM OF LAW RE: LACK OF PERSONAL JURISDICTION OVER THE DEFENDANT WILLIAM H. ANDERSON, JR.

STATEMENT OF THE CASE

On February 18, 1972 one Robert E. Gray, an employee of The Kaplan Trucking Company, allegedly drove a truck belonging to or leased by The Kaplan Trucking Company into a toll booth on Route 90 at Ripley, New York injuring the Plaintiff, Francis J. Markham. Subsequent to such accident, the above captioned complaint was filed alleging, in part, that the Defendant William H. Anderson, Jr., a medical doctor, examined said Robert E. Gray over a period of time and recklessly or negligently certified that said Robert E. Gray was qualified to operate motor vehicles in accordance with Federal Motor Carrier Safety Regulations.

Although the Defendant, William H. Anderson, Jr., is not a resident of the state of New York, does not practice medicine in the state of New York, owns no property in New York, and does no business in New York, service was made upon him by Richard Johnson, United States Marshall for the Western District of Pennsylvania, on December 4, 1973 at 1:30 p.m. at Route 20 West Springfield, Pennsylvania.

In reply to the complaint filed by the Plaintiffs, Attorney James R. Jenks of the law firm of English, Bowler & Jenks, who then represented the Defendant William H. Anderson, Jr., filed the Motion To Quash Return of Service of Summons and To Dismiss Complaint As to William H. Anderson, Jr.

STATEMENT OF THE QUESTION

1. Does jurisdiction exist over William H. Anderson, Jr. by virtue of New York CPLR Section 302(a)(3)(ii); i.e., did or does William H. Anderson, Jr., derive substantial revenue from interstate or international commerce so as to make him amenable to legal suit in the State or Federal Courts sitting in New York?

ARGUMENT

1. Dr. William H. Anderson's medical practice does not involve him in interstate commerce to any degree, and, thus, it cannot be held that he derives substantial revenue from interstate commerce.

The legal argument pending before this Court is not only crucial to the posture of this civil suit, but also goes to the concern expressed by the United States Supreme Court in decisions such as International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95 and Hanson v. Denckla, 387 U.S. 235, 785 S. Ct. 1228, 2 L.Ed. 2d 1283 governing what "minimum contacts" with the state are necessary before that state may claim jurisdiction over a person or corporation involved in a suit. This controversy clearly outlines the breadth and grasp of the tentacles created by the "long-arm" statutes that reach out as far as possible to ensnarl unsuspecting victims.

Of primary importance in the consideration of this issue is the fact that no allegation has been made, nor could be made, since it would be without any basis, that Dr. Anderson's substantial contacts with interstate commerce were by his certification of the truck driver who brought his truck into the state of New York. The issue before this Court, and of the utmost importance in trimming the tentacles of this statute before all control of it is lost, is whether a physician, who lives outside of New York and near the border of a third state, and who performs operations and other surgical duties at a hospital located in that third state, is involved in interstate commerce to any degree; and more specifically, whether he derives substantial revenue from interstate commerce by so doing.

of Joseph M. McLaughlin at C 302:24 points out the fact that Section 302(a)(3)(ii) had initiated early controversy by its assumption of jurisdiction over those persons committing torts outside of New York and expecting or having reason to expect the action to have consequences in New York. Mr. McLaughlin stated that in order to head off any protest that would have invalidated the statute on constitutional grounds, the legislature compromised by only pulling in those out of state tortfeasors who "derive substantial revenue from interstate or international commerce". Mr. McLaughlin concludes his explanation of this part of Section 302 by stating that the collateral activities of the party involved in interstate commerce "need not even occur in New York so long as they are interstate and substantial".

Having set forth the basic requirements of Section 302(a)(3)(ii), I will proceed to examine a few selected cases decided by the State or Federal Courts sitting in New York which have struggled to balance this procedural statute with constitutional requirements recognizing the need for "minimum contacts" with the forum state.

The United States District Court for the Southern District of New York considered this dilemma in the case of Path Instruments International Corp. v. Asahi Optical Co., 312 F. Supp. 805 (1970). The action was brought by the plaintiff against three corporate and six individual defendants on the basis of an alleged conspiracy to injure the plaintiff's business by inducing a breach of contract and by unfair competition.

In considering whether one of the corporate defendants, Hughes-Owens (Illinois), derived a "substantial revenue from interstate commerce" in light of the fact that its gross sales revenue in 1968-1969 was only $85,021.45, the District Court stated at page 829 that, "In absolute terms this would not seem to be the substantial revenue contemplated by Section 302(a)(3)(ii)." Although the Court decided that this factor alone was not enough to defeat the claim that the corporation was deriving substantial revenue from interstate commerce since its sales were consummated throughout the United States and Canada, the language of the Court in explaining its decision sheds further light on how Section 302(a)(3)(ii) is to be interpreted:

> "The 'substantial revenue' provision of Section 302(a)(3)(ii) is intended to extend the jurisdiction of New York Courts to those defendants committing out-of-state tortious acts with repercussions in New York, who, because of their operations, can consistently with the requirements of fundamental fairness be expected to defend lawsuits in foreign forums. While Hughes-Owens' (Illinois) small size may render it a marginal case, we think that given the inherently and almost exclusively interstate character of its business operations as a sales and distributional arm of a much larger organization, the revenue it derives from interstate commerce is sufficient to meet the requirements of Section 302(a)(3)(ii) and to square with constitutional limitations on state long-arm jurisdiction."

Pursuant to the guidelines set by the Court for explaining its application of Section 302(a)(3)(ii) to the corporate defendants, the Court dismissed the individual defendants since it found that although all of them had visited the state for business purposes, none had been involved in the "persistent or substantial forms of conduct contemplated by Section 302(a)(3)(ii)." (312 F. Supp. 810).

The New York District Court in the Path Instruments case diligently marked the path toward its decision by explaining that the interstate character of Hughes-Owens provided the "minimum contact" with New York that appropriately left the corporation the expectation that it would be required to defend lawsuits in foreign forums.

An indication that the New York State Courts have employed the same basic formula for computing "substantial revenue" for Section 302 purposes was given by the Supreme Court of Nassau County in Gilmore v. J. S. Inship, Inc., 228 N.Y.S. 2d 127 (1967). This action was brought by an automobile buyer against the automobile distributor for New York along the eastern seaboard, the Pennsylvania corporation which imported the automobile, and the British corporation which manufactured it. The basis of the suit was that the auto purchased was defective. The manufacturer and the importer both moved for dismissal based on the lack of jurisdiction of the New York Courts over them.

The New York Court in refusing to dismiss, based its decision on Section 302(a)(3). Most important for our purposes was the discussion

employed by the Court at page 132 in explaining the difficulty of the Courts in grasping any instant formulae or equations under Section 302(a)(3) for the purpose of determining when a corporation has derived substantial revenue from interstate or international commerce. In part, the Court explained the dilemma,

> "What constitutes 'substantial revenue' under CPLR 302(a)(3)(i) and (ii) is not defined in the statute or in the Judicial Conference Report. . . . Viewed in the context of the constitutional limits discussed below . . . .the phrase should, logically, be construed to require comparison of New York (or interstate or international) gross sales revenue with a defendant's total gross sales revenue, or New York interstate or international net profits with a defendant's total net profits, but there are cases which deal with the question of substantiality in terms of dollar volumes of sales or profit in the abstract,. . ."

Thus, the New York Supreme Court for Nassau County proposed that either a comparison of sales revenues or net profits could be employed to determine "substantial revenue" or an absolute dollar figure could suffice in certain cases. In any event, the Court spoke only in terms of sales or profits from sales as being the determining factor.

Before learning to swim any novice must, of course, wet his feet; likewise, before one can derive substantial revenue from interstate or international commerce he must wade into the "pool" of commerce. Both the District Court for the Southern District Court of New York and the Nassau County Supreme Court respectively, in the cases set forth above, have employed Section 302(a)(3) in light of gross sales, profits, or revenue from commerce. As difficult as it is to place an all-encompassing formula upon what constitutes substantial revenue from interstate or international commerce, it has been virtually impossible for any Courts to suggest an all-encompassing formula for what constitutes "commerce", and more specifically, "interstate or international commerce". And yet, it is encumbent upon this Honorable Court to first determine whether there is any possibility that William H. Anderson, Jr., or any physician for that matter, is to be classified as a person engaged in interstate commerce simply through the

practice of his profession in hospitals or in a hospital that is nothing more than an extension of his office or working place. Is it possible that the legislators who drafted this statute, or [illegible] similar "long-arm" statute for that matter, would intend that a physicit[illegible] operates in a hospital in a neighboring state is engaged in commerce, and again, more specifically in interstate commerce?

As mentioned above, few attorneys or judges would attempt to define "commerce" or "interstate commerce" because of the broad interpretations possible. However, an excellent attempt is made by the authors of C.J.S. to compile various definitions of these terms as the Courts have viewed them. At 15 C.J.S., Commerce, Section 2 an attempt is made at defining commerce and interstate commerce therein:

> "In view of the fact that, when defining 'commerce' the Courts are considering its meaning in the constitutional expression 'commerce among the several states', the same definitions are frequently attributed to 'commerce', 'interstate commerce' and 'commerce among the states', as shown supra Section 1. However, in some cases definitions are stated which differentiate interstate commerce from other kinds of commerce. As so defined, it means a free interchange of commodities between citizens of different states, without regard to stateline; intercourse among the several states, commerce between two or more states; intercourse and traffic between the citizens inhabitants of different states; passing of merchandise from one state to another, from one person to another, to be sold in competition with other goods in ordinary channels of trade; and it must be such as takes place between states as differentiated from commerce wholly within a state."

And for clarification purposes, we may look at Section 1 of 15 C.J.S., Commerce, for a definition of "commerce" generally,

> "Commerce includes trade, traffic, the purchase, sale or exchange of commodities, and the transportation of persons or property, . . .(and) is broader than, and is not limited to, trade, traffic, transportation, or the purchase, sale, or exchange of goods on commodities."

At this point in the argument before this Court, perhaps the Defendant's position would seem to be one requesting a comparison of income derived from care and treatment of patients in Pennsylvania as compared to that income derived from care and treatment of patients rendered in Brown Memorial Hospital in Conneaut, Ohio. However secure the Defendant's position

would be by such an inspection if this Court follows the basic formulae employed by the Courts in the decisions set forth earlier in this Brief, any such inspection would be irrelevant since Dr. Anderson's activities and income certainly fall outside of the realm of "commerce" as set forth in any definition or formula.

A case offering the final blow to the Plaintiff's allegation of jurisdiction under Section 302(a)(3)(ii) is that of Young v. Kellex Corp., 82 F. Supp. 953 (E.D. Tenn. 1948). Although the Young case was decided long before Section 302 (a)(3)(ii) became effective, nevertheless, the case provides an excellent discussion of how this amorphous term labeled "commerce" can be confined within its proper boundaries.

The case dealt with an employee's action under the Fair Labor Standards Act. The employee who worked at Oak Ridge on the project making the atomic bomb claimed that he had not been paid overtime to which, allegedly, he was entitled under the "Fair Labor Standards Act." Said Act only applied, however, to employers engaged in interstate commerce. The District Court called this a decision of first impression which required intensive study as to what constitutes "interstate commerce" and "articles" of interstate commerce. Thus, the Court spent considerable time inspecting other decisions involving interpretations of "commerce" and "interstate commerce".

First of all, the Court in its study of the :Fair Labor Standards Act," stated at page 958 of 82 F. Supp. that, "One is impressed with the recurrence of terms that fit in with the practical idea of commerce, namely that commerce is passing of merchandise from one state to another, from one person to another, to be sold in competition with other goods in ordinary channels of trade."

The Court went on at page 958 of its decision in this discussion of commerce to state that,

> "Commerce is not a theory, hence courts have declined to define it in exact terms. They have considered specific problems and determined whether interstate commerce existed in a particular instance. Whether the law involved has been a tariff act, an anti-trust act, an interstate commerce act, a labor act, or some other, constantly have

buying and selling, that goods for commerce are those which are to be transported from seller to buyer, that somewhere there is a consumer willing to pay a price, that he buys from the one who offers him the most pleasing bargain. . ."

The Court, suggesting that the importance of its decision was too great to hint that it had relied on its own theories of commerce without the use of some higher tribunal, cited the United States Supreme Court in various decisions dealing with determinations of what constitutes "commerce".

At page 958 of its decision, the District Court cited the United States Supreme Court in Welton v. State of Missouri, 91 U.S. 275, 23 L.Ed. 347 for the following propositions:

"1. Commerce is intercourse for purposes of trade.

2. Transportation is not an abstraction, but is the carrying of commodities of trade.

3. Commerce contemplates a seller in one state and a buyer in another state, or in a foreign county."

And again at page 960 of its decision, the District Court cited the United States Supreme Court in Thornton et al v. United States, 271 U.S. 414, 46 S. Ct. 585, 70 L. Ed. 1013, for the proposition that,

> "The crossing of state lines is an important factor in determining that a thing is in interstate commerce provided that which crosses is itself commercial in character. . . .
>
> But the fact that an article crosses state lines is not conclusive of its being an article of commerce, or its being in interstate commerce. It could hardly be said that personal articles, such as a watch in an owner's pocket are 'goods in commerce', though they travel with their owner across state lines."

Finally, before returning to its own determination of whether work on the atomic bomb project engaged the employer-employee in interstate commerce, the District Court looked one last time to the United States Supreme Court in the case of Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs et al, 259 U.S. 200, 42 S. Ct. 465, 66 L. Ed. 898:

> "The business, although it may be called commerce does not become commerce among the States because the transportation that we have mentioned takes place. To repeat the illustration given by the Court below, a firm of lawyers sending one of its members to argue a case in the Chautauqua Lecture Circuit sends out lecturers who engage in such commerce because the lawyer or lecturer goes to another State."

Thus, having satisfied itself that the United States Supreme Court decisions were in agreement with the decision that it was about to hand down, the District Court provided its own summation and supporting language in explaining its decision to reject the claim of the employee that the "Fair Labor Standards Act" applied. The Court stated at page 959:

> "Whatever the statute or the nature of the litigation considered, if it pertains to commerce the same ideas emerge: Commerce is a dealing in commercial products. Commerce is a purchase, sale or exchange of merchandise. Commerce is commercial intercourse. Goods are things which are bought and sold. Articles are subjects of commerce are those things, tangible or intangible, which are communicated, transmitted, or transported as a business, for pay, or for profit, and as concomitants of business transactions."

CONCLUSION

Although it would be possible to cite other cases dealing directly with Section 302(a)(3)(i) or (ii) or cases defining or dealing with commerce in a more general sense, nothing more said could be more definitive on this particular case than the quote from the United States Supreme Court set forth above in the Federal Baseball Club of Baltimore, Inc. case where it was said that,

> "That which in its consumation is not commerce does not become commerce among the states because the transportation that we have mentioned takes place."

And again in the Thornton case, supra, where it was stated that,

> "The crossing of state lines is an important factor in determining that a thing is in interstate commerce, providing that which crosses is itself commercial in character."

Any first year law student recognizes the fact that a legal argument, as crucial as the issue may be, cannot be presented for determination by the State or Federal Courts unless a "case" or "controversy" provides the advocate the forum and proper cause of action. The basic issue before this Court is whether William H. Anderson, Jr. was involved in interstate commerce to begin with, and secondly, whether he derived substantial revenue from interstate commerce. The broader issue, however, is whether a reputable

and licensed physician who must cross state lines in order to care and treat patients, whether by performing surgery in a hospital in a state separate from that in which the physician resides or perhaps even at an office in that other state, is involved in interestate commerce or commerce in any form. In the determination of this issue, the Supreme Court decisions such as Hanson v. Denckla, supra, and International Shoe Co. v. Washington, supra, which strictly required "minimum contacts" with the forum state must never be forgotten. It must be assumed that the Courts which have considered this statute or have considered Section 302(a)(3)(ii) have deemed it to be constitutional, in regard to these "minimum contacts", by employing a theory that where a person or corporation avails itself of the opportunity to profit by commerce among the states, it must expect to be amenable to suits in foreign states when that opportunity to engage in interstate commerce results in the person or corporation deriving substantial revenue from interstate commerce.

However, if the legislators who drafted this procedural statute did indeed create it with the belief that its tentacles would eventually be able to surround a physician such as Dr. Anderson whose surgical procedures in Brown Memorial Hospital in Conneaut, Ohio could not possibly be deemed interstate commerce to begin with, and whose revenue from such procedures falls far short of substantial revenue at all, it is encumbant upon this Court, at this point, to avail itself of the opportunity to insure that constitutional guidelines are not eroded. For as the United States Supreme Court stated in Hanson v. Denckla, 357 U.S. 235 at pages 250 to 251, 78 S. Ct. 1228, 1238, 2 L.Ed. 2d 1283 (1938),

> "as technical progress has increased the flow of commerce between states, the need for jurisdiction over nonresidents has undergone similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents has evolved from the rigid rule of Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565, to the flexible standard of

International Shoe Co. v. State of Washington, 326 U.S.310, 66 S. Ct. 154, 90 L. Ed. 95. But it is a mistake to assume that this transheralds the eventual demise of all restrictions of the personal jurisdiction of state courts. Those restrictions are more than a guarantee of immunity from inconvenience or distant litigation. They are a consequence of territorial limitations on the power of the respective states. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the minimal contacts with a state that are the prerequisite to its exercise of power over him."

William H. Anderson, Jr. is a physician residing in Pennsylvania, practicing solely out of an office in Pennsylvania, and performing surgical procedures only in Brown Memorial Hospital in Conneaut, Ohio. To imply, and even more dangerously to hold, that the practice of his profession, which in no manner, shape, or form relates to the sale of goods, involves him in commerce and to argue that this practice places him within the realm of interstate commerce any more than his counsel's argument before this Honorable Court places him in interstate commerce, would be a serious erosion of the constitutional safeguards to which the United States Supreme Cour has always guaranteed that nonresidents of foreign state were entitled. The above captioned proceeding must be dismissed because of the lack of jurisdiction of any New York State Court over the person of William H. Anderson, Jr.

Respectfully submitted,

KNOX GRAHAM PEARSON McLAUGHLIN
& SENNETT, INC.

By _____
Steven P. Simon, Esq.
Attorneys for Defendant
William H. Anderson, Jr.
23 West Tenth Street
Erie, Pennsylvania 16501

Plaintiffs' brief in opposition to defendant Anderson's motion to dismiss

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

FRANCES J. MARKHAM and GEORGE W. MARKHAM,

Plaintiffs,

-against-

ROBERT GRAY, THE KAPLAN TRUCKING COMPANY and WILLIAM H. ANDERSON, JR.,

Defendants.

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT ANDERSON'S MOTION TO DISMISS.

FACTS

On February 18, 1972, defendant Robert E. Gray, an employee of defendant The Kaplan Trucking Company, drove a truck into a toll booth on the New York State Thruway injuring plaintiff Frances J. Markham who was a toll collector inside the booth. Upon information and belief, at the time of the accident defendant Gray was in a semi-comatose state. Also upon information and belief, defendant Gray was suffering from diabetes mellitus and required insulin by injection daily.

Defendant Anderson was the physician of defendant Gray. Defendant Anderson physically examined defendant Gray each year for 14 years and after each examination defendant Anderson certified that the driver was qualified to operate commercial vehicles in accordance with the Federal Motor Carrier Safety Regulations. However, due to defendant Gray's requirement of insulin by injection, he was not physically qualified to operate motor vehicles in interstate commerce under the requirements of the Federal Motor Carrier Safety Regulations.

Upon information and belief, defendant Anderson resides in and practices medicine in the Commonwealth of Pennsylvania and also cares for his patients in and practices in Brown Memorial Hospital in Conneaut, Ohio.

On December 4, 1973, defendant Anderson was personally served with the summons and complaint in the within action by the United States Marshal for the Western District of Pennsylvania. He has now moved to quash the return of service of the summons and to dismiss the complaint.

QUESTION PRESENTED

Does this Court have personal jurisdiction over the defendant Anderson?

ARGUMENT

Rule 4 (e) of the Federal Rules of Civil Procedure provides that "Whenever a statute or Rule of Court of the state in which the District Court is held provides...for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state,...service may...be made under the circumstances and in the manner prescribed in the statute or rule."

Section 313 of the New York Civil Practice Law and Rules (CPLR) provides that a person subject to the jurisdiction of the Courts of New York under Section 302 of the CPLR may be served with a summons without the state in the same manner as service is made within the state.

CPLR Section 302, New York's Long Arm Statute, provides for personal jurisdiction over non-domiciliaries of New York based upon acts of the non-domiciliaries. Subdivision (a),(3),(ii) of that Section grants personal jurisdiction over any non-domiciliary

who "Commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he expects or should reasonably expect the act to have consequence in the state and derives substantial revenue from interstate or international commerce..."

Thus the requirements of CPLR 302 (a),(3),(ii) are as follows:

1. The commission of a tort without the state;
2. An injury within New York State;
3. A reasonable expectation of consequences within New York State;
4. Defendant's derivation of substantial revenue; from
5. Interstate commerce.

As the complaint alleges, defendant Anderson negligently and illegally certified defendant Gray as being fit to drive in interstate commerce. This tortious certification was made outsi of New York State and thus fulfills the first requirement.

As a result of defendant Anderson's wrongful certification of defendant Gray's ability to drive in interstate commerce, defendant Gray did engage in interstate commerce while not physically fit to do so and did cause injury to the plaintiffs within New York State. This fulfills the second requirement.

In Brown v. Erie-Lackawanna R.R. Co., 54 Misc. 2d 225 (Sup. Ct., Onieda Co., 1967), the Court held that "The test of whether the defendant expects or should reasonably expect the act to have consequences in this State is an objective not a subjecti (i.e. what is in the mind of the non-resident) one, and should be so construed." In the instant case, defendant Anderson certified defendant Gray as being fit to engage in interstate commerce. De fendant Anderson also had communication with defendant Kaplan

Trucking Company in regard to the employment of defendant Gray. Since defendant Anderson knew that Gray was involved in interstate trucking and was employed by Kaplan Trucking Company which operates in New York State, defendant Anderson should reasonably have expected defendant Gray to drive in New York State. In order to fulfill the statutory requirement of foreseeability, it was not necessary for defendant Anderson to foresee the specific injury-producing event within New York State. Gonzales v. Calorific Co., 64 Misc. 2d 287 (Sup. Ct. Queens Co., 1970).

The applicable Section of the CPLR requires that the defendant derive "substantial revenue from interstate or international commerce." However, the substantial revenue provision does not require any connection between the tortious act committed outside the state and the deriving of revenue from interstate commerce. Gillmore v. Inskip, Inc., 54 Misc. 2d 218 (Sup. Ct. Nassau Co., 1967).

The term "substantial revenue" is not defined within the CPLR nor in the legislative history of the enactment of Section 302. But the Gillmore case (Supra) held that that phrase should logically be construed to require comparison of interstate net profits with a defendant's total net profits. That case further held that on a motion to dismiss for lack of personal jurisdiction, the burden was on the defendants to show the absence of substantial revenue derived from interstate commerce.

Gonzales v. Calorific Co., 64 Misc 2d 287 (Sup. Ct., Queens Co., 1970), stated that "It must be noted that there need be no connection between the tortious act and the deriving of substantial revenues from interstate or international commerce."

Defendant Anderson argues that he is not engaged in interstate commerce when he practices medicine in Pennsylvania and regularly utilizes a hospital in Ohio. However, defendant cites

in his own brief the case of Gibbons v. Ogden, 9 Wheat. 1 (1824) in which Chief Justice Marshall refused to limit the definition of commerce to traffic or to the buying and selling or the interchange of commodities. The Court stated that "This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly is traffic, but is is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

The New York Courts in Gluck v. Fasig Tipton Co., 63 Misc. 2d 82 (Sup. Ct. New York Co., 1970), had occasion to interpret CPLR 302 (a),(3),(ii) under a very similar fact pattern. In Gluck, the plaintiff purchased a mare at an auction sale in the State of New York. One of the defendants was a veterinarian who falsely certified that the mare was pregnant. The veterinarian was domiciled in Kentucky and service of process was made in Kentucky under CPLR 302. The defendant moved to dismiss the action on the ground of lack of personal jurisdiction in New York. The Court, in considering whether the defendant derived substantial revenue from interstate commerce, examined the financial information submitted by the defendant. The Court found that in each of the previous three years, the defendant received less than 1% of his income from veterinary services rendered outside the State of Kentucky. The Court found that that did not constitute substantial revenue and granted the motion to dismiss; but the implication of that case is that if the veterinarian did a greater percentage of out of state services, he would then derive substantial revenue from interstate commerce and would thereby be subject to New York jurisdiction.

In the instant case, defendant Anderson has submitted no

information concerning the amount of revenue he derives from the services he performs outside of his state of domicile. Therefore, plaintiffs respectfully request that they be permitted to engage in discovery procedures in order to determine the defendant's involvement in interstate commerce.

In Blair Holdings Corp. v. Rubinstein, 159 F. Supp. 14 SD NY 1954) the Court stated that "The right of a party to take depositions to secure information bearing on the question of jurisdiction, when that issue is before the Court, seems to be unquestioned at the present time."

The defendant asks the Court to dismiss the action against him by the bare assertion that he does not derive substantial revenue from interstate commerce. In Goldstein v. Compudyne Corp., 262 F. Supp. 524 (SD NY 1966) the Court was also faced with a motion to dismiss without being provided adequate information. That Court declined "...to make a determination in the blind." The Court adjourned the motion to dismiss pending discovery proceedings.

The advisability of taking depositions concerning issues of fact raised by a motion to dismiss for lack of personal jurisdiction has also been recognized by the Courts in H. L. Moore Drug Exch., Inc. v. Smith, Kline and French Laboratories, 384 F. 2d 97 (2d Cir., 1967) and Collins v. New York Central System, 327 F. 2d 880 (D.C. Cir. 1963).

4 A Moore's Federal Practice, paragraphs 30.52 [5] and 30.53 [5], suggest that " Where defendant moved to dismiss on any of grounds (1) to (5) in Rule 12 (b) (lack of jurisdiction of the subject matter or of the person, improper venue, insufficient process or insufficient service of process) the better authorities permitted either party to take depositions on the issues of fact raised by the motion..."

CONCLUSION

Since defendant Anderson's activities fall within the scope of CPLR 302, this Court has personal jurisdiction over the defendant, and, in the alternative, if any question exists as to the Court's jurisdiction over the defendant, discovery should be permitted to establish the necessary jurisdictional facts.

Respectfully submitted,

Dated, May 17, 1974.

BRANDT AND LAUGHLIN, P. C.

By _____
Stephen Teret
Attorneys for Plaintiffs
Post Office Box 155
158 East Main Street
Westfield, New York 14787

Order allowing plaintiffs to conduct discovery proceedings on motion to dismiss

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

FRANCES J. MARKHAM and GEORGE W. MARKHAM,

Plaintiffs

-vs- Civil 1973-547

ROBERT E. GRAY, THE KAPLAN TRUCKING COMPANY and WILLIAM H. ANDERSON, JR.,

Defendants

DECISION
and
O R D E R

CURTIN, District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

343

FRANCES J. MARCHAM and GEORGE W. MARCHAM,

Plaintiffs

-vs- Civil 1973-547

ROBERT E. GRAY, THE KAPLAN TRUCKING COMPANY and WILLIAM H. ANDERSON, JR.,

Defendants

APPEARANCES: BRANDT AND LAUGHLIN (ROBERT M. LAUGHLIN, of Counsel), Westfield, New York, for Plaintiffs.

KNOX, GRAHAM, PEARSON, McLAUGHLIN AND SENNETT, INC. (JOHN M. McLAUGHLIN, of Counsel), Erie, Pennsylvania, for Defendant William H. Anderson, Jr.

On February 18, 1972 the defendant, Robert E. Gray, an employee of the Kaplan Trucking Company, drove a Kaplan truck into a toll booth on Route 90 at Ripley, New York, injuring the plaintiff, Frances J. Marcham. The motion to dismiss now before the court was filed by the defendant, William H. Anderson, Jr., a physician residing in West Springfield, Pennsylvania, where service of the summons and complaint was made upon him. The plaintiff charges negligence against Anderson because he

certified that defendant Robert H. Gray was fit to drive a motor vehicle in interstate commerce. Plaintiff claims that this certification was negligent and caused the accident leading to the injury of plaintiff when the vehicle operated by Gray struck the toll booth where he was working.

Although defendant Anderson is not a domiciliary of the State of New York, jurisdiction is claimed under Section 302(a)(3)(ii) of the New York Civil Practice Law and Rules. Section 302, entitled Personal Jurisdiction by Acts of Non-domiciliaries, provides that a New York court may exercise personal jurisdiction over any non-domiciliary if he

> (3) Commits a tortious act without the state causing injury to person or property within the state, . . .
>
> * * *
>
> (ii) Expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate . . . commerce.

Plaintiff claims jurisdiction over defendant Anderson because the alleged negligent certification which occurred

in Pennsylvania caused the injury in New York State, and that because Anderson knew the kind of work Gray was doing, he should have expected that his negligent certification would lead to an accident. Plaintiff asserts further that Anderson derived substantial revenue from interstate commerce since he is a resident of Pennsylvania but practices in a Conneaut, Ohio hospital. Defendant Anderson seeks dismissal of this cause because his act could not reasonably be expected to have the consequences which resulted in plaintiff's injury and, furthermore, that under §302(a)(3)(ii) there is no showing that he derived a substantial amount of his revenue from interstate commerce. Plaintiff requests that the motion of defendant be dismissed or, in the alternative, that the court permit discovery in order to determine whether sufficient facts exist to base the jurisdictional claim.

It appears to the court that, under certain circumstances, a doctor could reasonably expect that negligent certification might lead to an accident in New York State. However, the court lacks sufficient factual information upon which to make a judgment in this case about

the circumstances of the certification or the interstate activities of the defendant. Plaintiffs may take depositions, file interrogatories, or conduct any other appropriate discovery by September 30, 1974, in order to develop facts necessary to answer defendant's motion. The parties are also directed to file with the court, on or before September 30, 1974, additional briefs on the meaning of "interstate commerce" under §302 of the New York C.P.L.R. as it relates to this lawsuit.

So ordered.

JOHN T. CURTIN
United States District Judge

DATED: July 30, 1974

Plaintiffs' interrogatories to defendant Anderson

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

39a

FRANCES J. MARKHAM and GEORGE W. MARKHAM, Plaintiffs	)	
vs.	)	Interrogatories
ROBERT E. GRAY, THE KAPLAN TRUCKING COMPANY and WILLIAM H. ANDERSON, JR., Defendants	)	Civil Action No. 1973547

ANSWERS TO PLAINTIFFS' INTERROGATORIES

AND NOW, this 11th day of September, 1974, comes the Defendant William H. Anderson, Jr., by his attorneys, Knox Graham Pearson McLaughlin & Sennett, Inc., and gives answers to the Interrogatories of the Plaintiffs.

1. William H. Anderson, Jr.

2. Physician.

3. Box 122, West Springfield, Pennsylvania, 16443.

4. Pennsylvania, Ohio, South Carolina.

5. Brown Memorial Hospital, Conneaut, Ohio.

6. Brown Memorial Hospital, Conneaut, Ohio.

7. General practitioner with a limited practice in cardiology.

8. The Pennsylvania Medical Society and the Erie County Medical society.

9. Dr. Anderson averages 14 hours per week practicing medicine in the State of Ohio. This consists of making his rounds and surgery at Brown Memorial Hospital from approximately 8:00 a.m. to 10:00 a.m. every day of the week.

10. Approximately 74 hours per week.

11. It is difficult to answer this question since the number of patients seen in Ohio varies. All of the patients seen by Dr. Anderson in the State of Ohio are seen in Brown Memorial Hospital. Dr. Anderson sees approximately 5 patients per day in the hospital with most of these patients

having an average stay of about one week. Thus, the best estimate that can be given to this question is that approximately 450 to 500 different patients are admitted to Brown Memorial Hospital by Dr. Anderson and seen by him there during the course of the year.

12. Since West Springfield, Pennsylvania is almost directly on the border between the States of Ohio and Pennsylvania, a great deal of Dr. Anderson's patients are from Ohio. The best estimate that can be given to this question is that approximately 60% of his patients are from Ohio and 40% from Pennsylvania. All patients treated by Dr. Anderson in Pennsylvania are at his office in West Springfield, Pennsylvania.

13. Approximately 50%.

14. The Northwestern School District of Albion Pennsylvania - official school physician no compensation in 1973. At the present time Dr. Anderson is still the official school physician for the Northwestern School District of Albion, Pennsylvania and he examines the children at the school in Albion, Pennsylvania.

15. Approximately 75% of the patients treated or examined by Dr. Anderson in Pennsylvania during 1973 who required hospital care during the course of his treatment received such hospital care at Brown Memorial Hospital in Conneaut, Ohio. About 25% of the patients were referred to other physicians at Hamot Medical Center if proper treatment was not available at Brown Memorial Hospital where Dr. Anderson practiced.

16. Again, this question is extremely difficult to answer, but the best estimate would be about 100 times. These referrals would only be on situations where the patient required some sort of treatment or surgery that Dr. Anderson was unable to perform himself.

17. The best estimate to this question is approximately 4 patients. It must be explained that Dr. Anderson is 1 of only 2 doctors who operate in Brown Memorial Hospital that have any expertise in cardiology. These 4 patients were referred to him because of cardiac problems that he was asked to treat.

18. None.

19. Less than 1%.

20 Dr. Anderson receives no actual salary from Brown Memorial Hospital. He does, however, read electro-cardiograms (approximately 100 a month). For each electro-cardiogram that he reads, he bills Brown Memorial Hospital from his office the amount of $6.00 per reading. This $6.00 charge is paid by the hospital and then the patient whose electro-cardiogram was read is billed by the hospital.

21. No.

22. Not applicable.

23. Yes.

24. $84,000.00.

25. $88,000.00.

26. No.

27. Not applicable.

28. Not applicable.

29. Although Dr. Anderson does treat patients who have been injured while employed in Ohio and then bills the Workmens Compensation Board for his services, Dr. Anderson is unable to state whether he has a rating by any agency in the State of Ohio.

KNOX GRAHAM PEARSON McLAUGHLIN
& SENNETT, INC.

By _____
Steven P. Simon, Esq.
Attorneys for Defendant
William H. Anderson
23 West Tenth Street
Erie, Pennsylvania 16501

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

FRANCES J. MARKHAM and GEORGE W. MARKHAM,

Plaintiffs,

-against-

ROBERT E. GRAY, THE KAPLAN TRUCKING COMPANY and WILLIAM H. ANDERSON, JR.,

Defendants.

INTERROGATORIES
Civil Action
No. 1973547

TO: KNOX, GRAHAM, PEARSON, McLAUGHLIN and SENNETT, INC. (JOHN M. McLAUGHLIN, OF COUNSEL).
Attorneys for Defendant William H. Anderson, Jr.
23 West Tenth Street
Erie, Pennsylvania 16501

The plaintiffs request that the defendant William H. Anderson, Jr., answer under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories:

1. State your name.
2. State your occupation.
3. State all of your business addresses.
4. In what state or states are you licensed to practice medicine?
5. State the name and address of each hospital, clinic and nursing home in which you presently are privileged to practice medicine or perform sugical operations.
6. State the name and address of each hospital, clinic and nursing home in which you were privileged to practice medicine or perform surgical operations on December 4, 1973.
7. State the nature of your medical practice including any areas of specialization.

8. Name each medical society and professional organization of which you were a member on December 4, 1973.
9. State the average number of hours weekly you spend practicing medicine in the State of Ohio.
10. State the total average number of hours per week you spend practicing medicine.
11. State or approximate as closely as possible the number of patients you see annually in the State of Ohio, including hospitalized patients.
12. What percentage of the patients you treated in Pennsylvania last year were residents of the State of Ohio?
13. What percentage of the patients you treated in Ohio last year were residents of the Commonwealth of Pennsylvania?
14. State the name and address of every organization, corporation, society, fraternal brotherhood, association, school district, athletic team, labor union, or other group of any kind whatsoever which retained you in 1973 as a designated or official physician and state the amount of compensation received from each such organization.
15. What percentage of the patients you treated or examined in Pennsylvania during 1973 who required hospital care during the course of your treatment received such care at an Ohio hospital, clinic or nursing home?
16. How many times during 1973 did you refer patients for examination, diagnosis or treatment to any Ohio physician or surgeon?
17. How many times during 1973 werepatients referred to you for examination, diagnosis or treatment by an Ohio physician or surgeon?

18. Give the name and address of every educational institution which employs you as a full or part-time faculty member, lecturer or instructor.
19. What percentage of the patients you treated in the last calendar year were transients who were not residents of the State of Ohio or the Commonwealth of Pennsylvania, including motorists and tourists traveling through those states on Interstate 90?
20. State the amount of salary or direct compensation you received from Brown Hospital in Conneaut, Ohio during the last calendar year, if any.
21. Did you pay Ohio income tax last year?
22. If the answer to Number 21 above is affirmative, state your gross taxable Ohio income.
23. Did you pay Pennsylvania income tax last year?
24. If the answer to Number 23 above is affirmative, state your gross taxable Pennsylvania income.
25. What was your gross taxable income last year from all sources, as reported to the Internal Revenue Service?
26. Are you the proprietor of, or a partner in, any business which does business or engages in business-related activities in two or more states or one or more states and one or more foreign countries?
27. If the answer to Number 26 above is affirmative, state the names and addresses of all such businesses.
28. If the answer to Number 26 above is affirmative, state the approximate percentage of your income during the last calendar year which was derived from such business or businesses.
29. Have you been assigned a Workmen's Compensation

Please take notice that a copy of such answers must be served upon the undersigned within 30 days after the service of these interrogatories.

Dated: August 21, 1974.

BRANDT AND LAUGHLIN, P. C.

Stephen Tazet, Of Counsel
Attorney for Plaintiff
Post Office Box 155
Westfield, New York 14787

Plaintiff's supplemental brief in opposition to
defendant Anderson's motion to dismiss

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

----------x

FRANCES J. MARKHAM and GEORGE W. MARKHAM,

Plaintiffs,

-against-

ROBERT GRAY, THE KAPLAN TRUCKING COMPANY and WILLIAM H. ANDERSON, JR.,

Defendants.

CIVIL ACTION NO. 1973 547

----------x

PLAINTIFFS' SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANT ANDERSON'S MOTION TO DISMISS

FACTS

On February 18, 1972, defendant Robert E. Gray, an employee of defendant The Kaplan Trucking Company, drove a truck into a toll booth on the New York State Thruway injuring plaintiff Frances J. Markham who was a toll collector inside the booth. Upon information and belief, at the time of the accident defendant Gray was in a semi-comatose state. Also upon information and belief, defendant Gray was suffering from diabetes mellitus and required insulin by injection daily.

Defendant Anderson was the physician of defendant Gray. Defendant Anderson physically examined defendant Gray each year for 14 years and after each examination defendant Anderson certified that the driver was qualified to operate commercial

vehicles in accordance with the Federal Motor Carrier Safety Regulations. However, due to defendant Gray's requirement of insulin by injection, he was not physically qualified to operate motor vehicles in interstate commerce under the requirements of the Federal Motor Carrier Safety Regulations.

On December 4, 1973, defendant Anderson was personally served with the summons and complaint in the within action by the United States Marshal for the Western District of Pennsylvania. Defendant Anderson is a resident of the Commonwealth of Pennsylvania.

Defendant Anderson has moved to quash the service of the summons and to dismiss the complaint on the ground that this Court does not have jurisdiction over him. Plaintiff asserts jurisdiction over defendant Anderson on the basis of CPLR 302 (a)(3)(ii) in that Anderson committed a tort outside New York State that caused injury within the State and that Anderson should reasonably have expected his act to have consequences in the State and that he derives substantial revenue from interstate commerce.

This Court has already entertained oral argument on the motion and has received briefs from both parties. The Court ordered that plaintiffs be given the opportunity to examine defendant Anderson in order to ascertain whether he does, in fact, derive substantial revenue from interstate commerce.

Plaintiffs have submitted interrogatories on the jurisdictional issue to Anderson. The interrogatories and the answers

are now on file with this Court. They indicate that defendant Anderson is a physician with his office and residence in the Commonwealth of Pennsylvania. However, Dr. Anderson practices in an Ohio hospital and he sends approximately 75% of his Pennsylvania patients requiring hospitalization to the Ohio hospital for treatment. Dr. Anderson admits and sees about 450 to 500 patients in the Ohio hospital. About 60% of the patients Dr. Anderson treats in his Pennsylvania office are Ohio residents.

ISSUE

Does defendant Anderson derive substantial revenue from interstate commerce as contemplated in CPLR 302?

DISCUSSION

New York's Civil Practice Law and Rules §302 (a) provides for personal jurisdiction over a non-domiciliary who:

> "3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation arising from the act, if he...
>
> "(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce."

The long arm provision is available in this federal suit by virtue of the adoptive Rule 4 (e) of the Federal Rules of Civil Procedure.

Since the enactment of CPLR §302 (a)(3)(ii) in 1966,

v. U. S. Rubber Co., 156 F 1, 17, the Court said:

> "All interstate commerce is not sales of goods. Importation into one state from another is the indispensable element, the test of interstate commerce; and every negotiation, contract, trade and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce." (Emphasis supplied.)

The United States Supreme Court has left no doubt that the crossing of state lines is, without more, interstate commerce. In Atlanta Motel v. United States, 379 U.S. 241, 13 L Ed. 2d 258, 85 S. Ct. 348 the Supreme Court said:

> "That the 'intercourse' of which the Chief Justice (Marshall) spoke included the movement of persons through more states than one was settled as early as 1849, in the Passenger Cases...."

Such Broad constructions of interstate commerce have been approved by New York Courts. In People v. State Tax Commission, 245 App. Div. 229 (3rd Dep't, 1935) the Appellate Division stated:

> "By the adoption of the United States Constitution, the state conferred upon Congress the power to regulate commerce with foreign nations and among the several states. The words used in the Commerce Clause of the Constitution are to receive a broad and liberal application." (Emphasis supplied.)

And it has been said that "[e]ven isolated movements of single individuals or small amounts of private property across state lines are subject to congressional regulation under the commerce power." 32 N.Y. Jur., Interstate and Foreign Commerce §3, p.207.

The defendant, Dr. Anderson, is a general practitioner, and he maintains his office and residence in West Springfield, Pennsylvania. The following data, derived from Dr. Anderson's answers to interrogatories, clearly indicate the extent to which the doctor's practice, and income, depend upon interstate commerce:

1. Approximately 60% of the patients Dr. Anderson treats at his office in Pennsylvania are residents of Ohio. In order to receive Dr. Anderson's treatment and care, they must and do cross a state line.

2. Approximately 75% of the patients Dr. Anderson treats in Pennsylvania who require hospital care are sent by Dr. Anderson across a state line to Brown Memorial Hospital in Conneaut, Ohio. Dr. Anderson estimates that he treats at least 500 different patients at Brown Memorial Hospital each year.

3. Dr. Anderson himself must cross a state line to treat his patients at Brown Memorial Hospital. He travels from Pennsylvania to Ohio to make his rounds at Brown Memorial Hospital every day of the week.

4. Approximately 50% of the patients Dr. Anderson treats in Brown Memorial Hospital are residents of the Commonwealth of Pennsylvania who must cross a state line to treat homes in

order to receive hospital care under Dr. Anderson's supervision.

5. Dr. Anderson reads approximately 100 electro-cardiograms each month as a service for Brown Memorial Hospital, receiving a $6.00 payment from the hospital for each such reading. Dr. Anderson must cross a state line to perform this service.

Dr. Anderson reported an income last year of $88,000.00. Given the data detailed above, it is reasonable to assume that substantially more than half of that income was generated by patients who crossed a state line in order to receive treatment, and/or by Dr. Anderson's crossing a state line in order to administer treatment or perform services.

In the recent case of Allen v. Auto Specialties Mfg., 45 A.D. 2d 331 (3d Dep't., 1974), the New York Appellate Division stated:

> "What constitutes 'substantial revenue' under CPLR 302 (subd. [a], par. 3, cls. [i] and [ii]) is not defined in the statute. The phrase should be construed to require comparison between a defendant's gross revenue from interstate or international business with total gross...revenue, and between a defendant's net profit from interstate or international business with total net profit."

Dr. Anderson's revenue from patients whom he causes to cross state lines must be considered substantial under this test.

Since Dr. Anderson regularly and systematically crosses

state lines to practice medicine in more states than one, since the doctor's reputation and prestige cause persons who constitute the majority of his patients to regularly and systematically cross state lines to receive his treatment, and since Dr. Anderson regularly and systematically sends patients needing hospital treatment across state lines to receive such treatment, there can be no doubt that Dr. Anderson's business and conduct constitute "interstate commerce" within the federal and state definitions of the phrase.

Not only does Dr. Anderson's business, in general, involve interstate commerce, but the act which gave rise to the instant litigation is directly related to interstate commerce. The gravamen of this action against Dr. Anderson is that he wrongfully certified defendant Gray as being physically fit to drive a truck in interstate commerce.

In Path Instruments International Corp. v. Asaki Optical Co., 312 F. Supp. 805 (DC NY 1970), a federal district court considered New York's long arm statute and said:

> "The purpose of the 'substantial revenue' provision of subdivison (a)(3)(ii) of this section is to extend the jurisdiction of New York courts to those defendants who commit out of state tortious acts with repercussions in New York and who because of the extent and non-local nature of their operations can consistently with the requirements of fundamental fairness be expected to defend lawsuits in foreign forums."

Dr. Anderson's practice is not local in the sense of being confined primarily to one jurisdiction. He is licensed to practice medicine and he does in fact practice medicine in

both Ohio and Pennsylvania. Therefore the possibility of being sued in a forum other than Pennsylvania must be reasonably foreseeable to Dr. Anderson.

Also, whatever inconvenience is alleged on the part of Dr. Anderson in defending a suit in an out-of-state forum is actually fictional in that the real party in interest is Dr. Anderson's insurer. Upon information and belief, Dr. Anderson is insured by the Hartford Insurance Group, which has an obligation to defend and indemnify the defendant in this suit. The insurer does business in all jurisdictions, and it cannot truthfully be alleged that it would prejudice or inconvenience the insurance company to defend a suit before this Court.

Moreover, the major part of Dr. Anderson's income depends upon his ability to attract Ohio residents to cross the state line to receive his care and upon his ability to cross a state line to administer treatment and care. Given the amount of money which is therefore generated by interstate commerce which Dr. Anderson receives each year, it is not unreasonably burdensome or onerous for him to defend a lawsuit in a jurisdiction other than Pennsylvania.

CONCLUSION

It is respectfully submitted that Dr. Anderson receives substantial revenue from interstate commerce and that

he therefore falls within the scope of CPLR 302 (a)(3)(ii), granting this Court jurisdiction over the defendant.

Dated: September 26, 1974.

Respectfully submitted

BRANDT AND LAUGHLIN, P. C.

By _____
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Defendant Anderson's memorandum of law re: lack of personal jurisdiction over defendant Anderson

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

67a

FRANCES J. MARKHAM and GEORGE W. MARKHAM	:	
vs.	:	CIVIL ACTION No. 1973 - 547
ROBERT E. GRAY, THE KAPLAN TRUCKING COMPANY, and WILLIAM H. ANDERSON, Jr.	:	

MEMORANDUM OF LAW RE: LACK OF PERSONAL JURISDICTION OVER THE DEFENDANT WILLIAM H. ANDERSON, JR.

STATEMENT OF THE CASE

On February 18, 1972 one Robert E. Gray, an employee of The Kaplan Trucking Company, allegedly drove a truck belonging to or leased by The Kaplan Trucking Company into a toll booth on Route 90 at Ripley, New York injuring the Plaintiff, Francis J. Markham. Subsequent to such accident, the above captioned complaint was filed alleging, in part, that the Defendant William H. Anderson, Jr., a medical doctor, examined said Robert E. Gray over a period of time and recklessly or negligently certified that said Robert E. Gray was qualified to operate motor vehicles in accordance with Federal Motor Carrier Safety Regulations.

Although the Defendant, William H. Anderson, Jr., is not a resident of the state of New York, does not practice medicine in the state of New York, owns no property in New York, and does no business in New York, service was made upon him by Richard Johnson, United States Marshall for the Western District of Pennsylvania, on December 4, 1973 at 1:30 p.m. at Route 20 West Springfield, Pennsylvania.

In reply to the complaint filed by the Plaintiffs, Attorney James R. Jenks of the law firm of English, Bowler & Jenks, who then represented the Defendant William H. Anderson, Jr., filed the Motion To Quash Return of Service of Summons and To Dismiss Complaint As to William H. Anderson, Jr.

STATEMENT OF QUESTION

1. Does this Court have in personam jurisdiction over the Defendant, William H. Anderson, Jr., pursuant to Federal Rules of Civil Procedure, Rule 4(e) or under New York CPLR Section 302?

ARGUMENT

1. Although Rule 4(e) of the Federal Rules of Civil Procedure permits the Federal Courts to apply the Civil Rules of Procedure of the state in which the Court sits to determine whether jurisdiction has been acquired, even the most liberal "long arm" statute, Section 302 of the New York CPLR grants no basis for jurisdiction or service over the Defendant William H. Anderson, Jr.

Rule 4(e) of the Federal Rules of Civil Procedure provides in part, "whenever a statute or rule of court of the state in which the District Court is held provides: (1) for service of a summons upon a party not an inhabitant of or found within the state, service may be made under the circumstances and in the mannerprescribed in the statute or rule". Thus, it is evident that the applicable Civil Rules of Procedure for the state of New York would determine if in personam jurisdiction and subsequent service of process would be proper in this court. By virtue of the Affidavit filed by Robert M. Laughlin, counsel for the Plaintiffs in this case, we know that service allegedly has been made pursuant to Section 302(a)(3) of the New York CPLR. Section 302(a)(3) of the New York Civil Practice Law and Rules provides in part that service may be made upon a nondomiciliary without the state where a cause of action arises out of the commission of a tortious act without the state causing injury to a person or property within the state. More specifically, Section 302(a)(3) is limited to a situation or situations in which the Defendant:

other persistent course of conduct or derives substantial revenue from goods used or consumed or services rendered, in the state; or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce;

Of particular assistance in interpreting how far this Statute will be extended to allow service over nondomiciliaries, was the decision of the District Court for the Southern District of New York in the case of Chunky Corp. v. Blumant Bros. Chocolate Co., 299 F. Supp. 110 (1969). This was a case in which an action was brought by a New York candy manufacturer against a Pennsylvania chocolate manufacturer for sale of contaminated chocolate. The chocolate manufacturer filed a Third Party Complaint versus a Chicago - based wholesaler from whom it bought allegedly contaminated milk and against a Pennsylvania dairy which delivered the milk. The Third Party Defendants moved to dismiss the Complaint based upon the lack of the jurisdiction of the New York District Court. Since the jurisdiction question revolved around whether or not domiciliaries allegedly committing tortious acts without the state were amenable to service of process in New York, the Court set out Section 302 of the New York CPLR for determination of whether the Third Party Defendants should be dismissed. The Court referred to Section 302 as the "single act" long arm statute.

The District Court in the Chunky case, for purposes of attempting to interpret the statute and the extent of its applicability, began by hypothetically assuming that there was some basis for finding that the Third Party Defendants had, in person or through an agent, committed a tortious act. Even under this assumption, however, the Court stated that it would still be necessary to establish that one of the qualifications of either Subsection (i) or (ii) of Section 302(a)(3) was met.

In this case, one of the Third Party Defendants established that 4% of the company's sales were to customers in the state of New York. In the

case before this Court, there are no allegations, nor are there any facts to support such allegations, that Dr. Anderson was doing or soliciting business, or engaging in a persistent course of conduct or deriving substantial revenue from services rendered in the state of New York. Even if the doctor's examination of a truck driver, such as the said Robert F. Gary, may have resulted in Mr. Gary driving his truck into New York, the decision in the Chunky Corp. case would clearly show that this was not enough to apply Section 302 (a) (3) (i). The Court in the Chunky Corp. case stated at page 150;

> Absent any clear authoritative guidence we are forced to anticipate how New York's highest court would construe the statute. Since each case must be decided on its own facts, it is difficult to establish in percentage terms the lower limits of this standard. However, we are persuaded that more contact with New York than has been shown here would be necessary to meet the requirements of Section 302 (a) (3) (i),

In determining whether Subsection (ii) of Section 302 (a) (3) is applicable in this case, this Court could follow the course followed by the District Court in the Chunky Corp. case. In that case, in discussing the applicability of Subsection (ii), the Court first of all dealt only with the first part of the subsection without considering the additional clause which requires that the Defendant "derive substantial revenue from interstate or international commerce". Thus, if this Court should consider solely, as did the District Court in the Chunky Corp. case, whether the Defendant allegedly committed a tortious act without the state of New York and expected or should reasonably have expected the act to have consequences in New York, then the decision of the Chunky Corp. court is again highly relevant. For, at page 115 of its decision, the court stated,

> However, we believe that the statute, even as so amended, should be construed to require a greater degree of reasonable foreseeability than that found here, where Christiana (one of the third party defendants) was unaware that the chocolate manufactured by Blumenthal in Pennsylvania might be shipped to New York. In the absence of such a requirement, the statutory test would rapidly be watered

down to [illegible] hindsight, by which the out-of-state defendant would be presumed to have reasonably foreseen the New York consequences of his conduct unless he could offer convincing proof to the contrary. Furthermore, such a loose standard would in our view violate Christian's due process rights under the constitution.

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Likewise, in the case before this Court, even assuming that Dr. Anderson may have committed a tortious act without the state, his certification of Mr. Gray as being fit to drive a motor vehicle could not possibly have allowed him to foresee that such an act would result in Mr. Gray's injury-causing collision at a toll booth in New York State. To [illegible]que otherwise would certainly be requiring the type of hindsight spoken by the Chunky Corp. Court.

As to the argument by Plaintiffs' counsel that Dr. Anderson was engaged in interstate commerce merely because as a resident and practicing physician in West Springfield, Pennsylvania, he traveled the few miles separating West Springfield from Conneaut, Ohio and practiced in Brown Memorial Hospital in Conneaut, it is stated at 15 Am Jur. 2d, C[illegible]merce, Section 2, that as Chief Justice Marshall stated in the case of Gibbons v. Ogden, 9 Wheat 1, 6 Led. 23 (1824), the definition "commerce" is difficult but that it is the equivalent of the phrase "intercourse for the purpose of trade" and comprises every species of commercial intercourse.

Certainly the mere fact that Dr. Anderson chooses to operate in Brown Memorial Hospital in Conneaut, Ohio cannot possibly mean that he is involved in commercial intercourse. Even where a doctor who, pursuant to his advertisements, went into another state to examine and prescribe for patients and sent the prescriptions from his home state to the patients in other states by mail, the court in the case of Slocum v. Ferdonia, 134 Kan. 853, 8 P. 2d 332, declared that this did not engage the physician in interstate commerce.

CONCLUSION

The local practice of William H. Anderson, Jr., in the rural community of West Springfield, Pennsylvania, and the lack of a hospital in that community which requires Dr. Anderson to operate in Brown Memorial Hospital in Conneaut, Ohio, must exclude the doctor from jurisdiction and service of process even under the most liberal interpretations of CPLR Section 302 (a) (3). Furthermore, there is no reason why this action could not be brought in the state of Pennsylvania since the Plaintiffs are residents of New York and all named Defendants are resident of either Pennsylvania or Ohio. Thus, no argument can be made by the Plaintiffs that a decision by this Court to dismiss the Complaint and quash the service of process against the Defendant, William H. Anderson, Jr., will eliminate their right to recover against Dr. Anderson.

For these reasons and the legal arguments set forth within this brief, the return of service of summons on Dr. Anderson should be quashed and the Complaint as to William H. Anderson, Jr., should be dismissed.

Respectfully submitted,

KNOX GRAHAM PEARSON McLAUGHLIN & SENNETT

By _____
Steven P. Simon, Esq.
Attorneys for Defendant,
William H. Anderson, Jr.,
23 West Tenth Street
Erie, Pennsylvania 16501

Decision of Hon. John T. Curtin

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

FRANCES J. MARKHAM and
GEORGE W. MARKHAM,

Plaintiffs

v. Civil 1973-547

ROBERT E. GRAY, THE KAPLAN TRUCKING
COMPANY and WILLIAM [illegible]. ANDERSON, JR.,

Defendants

DECISION
and
ORDER

CURTIN, District Judge

and caused the accident leading to the injury of plaintiff when the vehicle operated by Gray struck the toll booth where plaintiff was working. Jurisdiction for service was based upon Section 302(a)(3)(ii) of the New York Civil Practice Law and Rules. Section 302, entitled Personal jurisdiction by acts of non-domiciliaries, provides that a New York court may exercise personal jurisdiction over any non-domiciliary who:

> (3) commits a tortious act without the state causing injury to person or property within the state, . . . if he
>
> . . . .
>
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; . . . .

Plaintiff claims jurisdiction over defendant Anderson under this section because the alleged negligent certification which occurred in Pennsylvania caused the injury in New York State, and because Anderson knew the kind of

that there was insufficient factual information upon which to make a judgment in this case about the circumstances of the certification or the interstate activities of the defendant. In an effort to resolve this problem the court ordered for more factual information concerning the interstate activities of the defendant Anderson and then directed the parties to file with the court, on or before September 20, 1974, additional briefs on the meaning of interstate commerce under Section 202 as it relates to this lawsuit.

On September 16, 1974, in an effort to comply with this order, the defendant filed answers to plaintiffs' interrogatories. The following additional information was revealed. The defendant, William H. Anderson, is a physician licensed to practice in Pennsylvania, Ohio and South Carolina, whose principal place of business is in West Springfield, Pennsylvania. Dr. Anderson also practices medicine in Union Hospital [illegible], Conneaut, Ohio, [illegible] fourteen hours per week out of a [illegible] work week.

making his rounds and performing surgery from approximately 8:00 a.m. to 10:00 a.m. every day of the week. All of the patients seen by Dr. Anderson in the State of Ohio, approximately 450 each year, are seen in Brown Memorial Hospital, and of those 50% are from Pennsylvania. West Sysingfield, Pennsylvania is near the Ohio border and approximately 60% of the patients seen in Pennsylvania are from Ohio. Approximately 75% of the patients treated or examined in Pennsylvania during 1973 who required hospital care during the course of treatment received such care at Brown Memorial Hospital in Conneut, Ohio, and about 25% of the patients were referred to other physicians at Hamot Medical Center in Erie if proper treatment was not available at Brown Memorial Hospital. It is noted that Dr. Anderson receives no salary from Brown Memorial Hospital except for $3.00 per reading for each electrocardiogram he reads for and from the hospital which totals approximately $30 per month. His total income for 1973 from the [illegible] Medical

practice was $24,000.

With these additional facts at hand the court must now decide whether or not Dr. Anderson can properly be made subject to the jurisdiction of this court by virtue of Section 302(a)(3)(ii). At issue in this question is (1) whether defendant Anderson, by certifying Gray as qualified to operate a commercial vehicle, could have expected or should reasonably have expected his act to have consequences in New York; (2) whether a physician who practices medicine and derives revenue in two states derives revenue from interstate commerce; and (3) whether Section 302(a)(3)(ii), as applied, meets the constitutional limitations imposed on state long arm statutes.

In determining whether a defendant should reasonably have expected his act to have consequences in New York, an objective, not subjective test is applied. The statute does not require the defendant to foresee the specific consequences of his allegedly tortious act, but rather requires [illegible] reasonably.

Allen v. Auto Specialties Mfg. Co., 45 App. Div. 2d 331, 357 N.Y.S.2d 537 (3d Dept 1974), See also, McLaughlin, Practice Commentaries, 7B CPLR § 302 (McKinney's 1972) at 91-93. As pointed out by this court in its July 30th ruling, Dr. Anderson, by certifying that Cay was qualified to operate a commercial vehicle in interstate commerce, should reasonably have expected his acts to have consequences in New York.

Having answered this question in the affirmative, the court must therefore determine whether Dr. Anderson derived substantial revenue from interstate commerce, since both are requisites for jurisdiction under Section 302(a)(3)(ii). The threshold question presented to the court in this context is whether a physician practicing his profession in two contiguous states is engaging in interstate commerce under the statute. Since the term is not defined in the statute, nor has it been judicially construed, it must be defined by reference to the legislative history of the statute and to the construction

given interstate commerce under federal antitrust law and New York statutes which are not entirely different from Section 302(a)(3)(ii). In proposing Section 302(a)(3)(ii), the Judicial Conference sought an amendment broad enough to protect New York residents and not so broad as to burden unfairly nonresidents whose connection with the state is remote. 1965 Judiciary Session Laws, at 2703. The requirement of substantial revenue from interstate commerce, in addition to foreseeability, was intended to exclude non-domiciliaries whose business operations are of a local nature. Id. at 2703. The statute was not intended to fully exercise the state's constitutionally permitted long arm capabilities. The Judicial Conference suggested, for example, that while it might be possible, it would not be desirable, to exercise jurisdiction over a local Georgia retailer who sold a tire to a New York resident driving a vehicle bearing New York license plates, even though the retailer may have had reason to foresee [illegible] New York if the tire was defective. In this [illegible] Conference

said it might be fair and desirable to exercise jurisdiction over a defendant like manufacturer engaged in interstate or international commerce, whether or not related to New York, the essential difference being that the latter " ... is generally equipped to handle litigation away from his business location." Id. at 2709. Viewed in this light, the statute can be said to be directed towards those manufacturers engaged in substantial interstate activity who can expect and who are capable of defending suits in foreign forums and, therefore, Dr. Anderson was not within that class intended to be subject to long arm jurisdiction. From the facts as outlined above, Dr. Anderson's medical practice is of an essentially local nature and, therefore, he should not be expected or considered capable of defending suits in foreign forums.

While the instant case is not within an antitrust context, a construction of interstate commerce under Section 302(a)(3)(ii) can be gleaned from the antitrust case law defining that term, which construction

would be consistent with the legislative intent of New York's long arm statute. The practice of a profession such as medicine, or law, is predominantly a local operation. The fact that a surgeon lives on the border of his state and practices in two cities on either side of that border, does not alter the essentially local nature of his practice. Since the practice of a profession is predominently local in character, interstate commerce under Section 202(a)(3)(ii) should be construed to incorporate the profession-business dichotomy, at least to exclude a local physician who treats his patients in two bordering states. Under the antitrust laws, the practice of medicine has been said to be neither trade nor commerce within Section 1 of the Sherman Antitrust Act. Bond v. Washington Medical Society, 240 F.2d 256 (9th Cir. 1957). This construction of interstate commerce using the profession-business dichotomy has been used by the New York Court of Appeals in construing Section 340 of the New York General Business Law, which prohibits agreements whereby "business, trade or commerce" may be restrained.

See Matter of Pearson, 34 N.Y.2d 1, 355 N.Y.S.2d 335 (1974). In conclusion, then, Dr. Anderson could not be subject to New York State's long arm jurisdiction on the basis of Section 302(a)(3)(ii) because his activities as a doctor cannot be considered commerce.

Since the court has decided that Dr. Anderson's activities do not fall within the definition of commerce laid out above, the constitutional issues involved need not be reached. However, in passing, the court is considerably doubtful of the fact that Section 302(a)(3)(ii), as applied to Dr. Anderson, would pass constitutional standards of due process set forth in International Shoe Co. v. Washington, 326 U.S. 310 (1945); and Hanson v. Denckla, 357 U.S. 235 (1957); see also Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502, 507 (4th Cir. 1956).

In view of the above reasoning, the court concludes that although the defendant Anderson could reasonably expect his acts in certifying the defendant Robert E. Gray, to have consequences in New York, the

alone can be no basis for the exercise of New York jurisdiction over him, nor can Dr. Anderson's actions, which are from the facts inherently of a local nature, be considered interstate activity which would subject Dr. Anderson to New York jurisdiction under Section 302(a)(3)(ii). Therefore, the court grants defendant's motion to dismiss the cause of action against Dr. Anderson because of the fact that this court cannot maintain jurisdiction over him.

The Clerk is directed to enter judgment in behalf of defendant William H. Anderson, Sr., dismissing complaint.

So ordered.

John T. Curtin
John T. Curtin
United States District Judge

DATED: May 1, 1973

Judgment on decision dismissing action as to defen'
dant Anderson

JUDGMENT ON DECISION BY THE COURT — CIV 22 (7-63)

United States District Court

FOR THE

WESTERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. 1973-547

FRANCES J. MARKHAM & 1

vs.

WILLIAM H. ANDERSON, JR., et al.

JUDGMENT

This action came on for ~~trial~~ (hearing) before the Court, Honorable John T. Curtin, United States District Judge, presiding, and the issues having been duly ~~tried~~ (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the action be dismissed as to defendant William H. Anderson, Jr.

Dated at Buffalo, New York, this 1st day of May, 1975.

JOHN K. ADAMS

JOHN K. ADAMS
Clerk of Court

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

FRANCES J. MARKHAM and GEORGE W. MARKHAM,

Plaintiffs,

-against-

ROBERT E. GRAY, THE KAPLAN TRUCKING COMPANY and WILLIAM H. ANDERSON, JR.,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that Frances J. Markham and George W. Markham, the plaintiffs, hereby appeal to the United States Court of Appeals for the Second Circuit from the order and final judgment dismissing the action as to defendant William H. Anderson, Jr., entered in this action on May 1, 1975.

May , 1975.

BRANDT AND LAUGHLIN, P. C.

By_____
Robert H. Laughlin
Attorneys for Plaintiffs
158 East Main Street
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Westfield, New York 14787
(716) 326-3174

STATE OF NEW YORK }
CITY OF NEW YORK } ss.:
COUNTY OF NEW YORK }

Jacob D Rothman, being duly sworn, deposes and says, that he is over 18 years of age. That on the 12th day of August, 1975, he served 2 copies of the attached Appendix on John M. McLaughlin, Esq Attorney for Appellee 23 West 10th Street, Erie Co. 14501 and 2 copies of the appendix on the attorneys for the Defendants Joh Mapes 617-22 Liberty Bank Bldg Buffalo, N.Y. 14202 and Donald B. Eppers, 700 Niagara Frontier Bldg 290 Main Street, Buffalo New York herein by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a U. S. Post Office at 90 Church Street, New York City, directed to said attorneys at the aforementioned address

th being the place where maintain an offices for the regular transaction of business, and the last addresses mentioned in the papers last served by them

Jacob D. Rothman

Sworn to before me this
12th day of August, 1975.

Francis R Jones

FRANCIS R. JONES
Notary Public, State of New York
No. 24-1974285
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1977

Service of three ③ copies of the within
is admitted this day of 19